As regards the year 1954, the appellant contended that shares in the company to the nominal value of $20,000 — or, to be strictly accurate, $21,000, including an allotment of $1,000 as qualification for a directorship — which were allotted to him represented his bonus.

It is important to bear in mind, however, that these shares, which were of the nominal value of $1, had no market value in that they could not have been sold on a stock exchange. All the shares in the company were privately held by a limited number of persons and the open market value of any block of shares was negligible. It is true that upon the appellant's departure from the company Mr. George Lee bought back his shares at their full nominal value, but this does not affect the point that at the time of the gift they were of no substantial value; and the appellant himself stated this in evidence at page 90 of the record, where he said "the shares were worthless on the market". Moreover, Mr. George Lee said — and this would seem to be eminently likely — that the purpose of the gift of shares was to encourage the appellant and make him feel more responsible and interested in the business.

For all these reasons I consider that the finding of fact of the learned trial Judge that it was more probable than not that Mr Lee agreed on or about the 1st of April 1953 to pay the defendant a bonus cannot be supported. Moreover, it would appear from the judgment that the learned trial Judge in arriving at this finding of fact relied to a considerable extent upon the admission in the pleadings, which was only retracted at a late stage. Learned counsel for the respondents, however, stated in this Court that this admission was due to a misapprehension of fact.

That being so, the matter would seem to be determined and the respondents are entitled to succeed.

Even upon the basis, however, that it would not be proper for this Court to disturb the finding of fact to which I have referred, it would still seem that the appeal should fail.

The appellant relied on the case of *Powell* v. *Braun*[1] and the appellant gave evidence which, if accepted in full, might be considered to bring the matter within the scope of that case. The learned trial Judge, however, dealt with this aspect of the matter in his judgment at pages 131 and 132 of the record and stated that he disbelieved the appellant's version of the facts in that regard.

In the light of the findings of fact which the learned trial Judge was prepared to make, he considered that the matter properly fell within the purview of the case of *Kofi Sonkersette Obu* v. *A. Strauss & Co. Ltd.*[2] where, at page 250, Sir John Beaumont said :—

"The Court cannot determine the basis and rate of the commission. To do so would involve not only making a new agreement for the parties but varying the existing agreement by transferring to the Court the exercise of a discretion vested in the respondents."

In my opinion, the learned trial Judge has correctly stated the principle which should govern this matter and it would therefore follow that, even on the assumption that some reference to a bonus was made by Mr. George Lee at the initial conversation with the appellant in 1953, the appellant has failed to establish his counterclaim.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *N. A. Christopher; Donaldson & Burkinshaw.*

KAN SIK FONG v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) January 18, 1961]

[J.B. — Criminal Appeal No. 29 of 1960]

Customs Ordinance, 1952, ss.99, 129 and 131 — Evidence Ordinance, 1950, ss.11, 14 and 155 — Admissibility of similar fact evidence — Criminal Procedure Code (Cap. 6), ss.113 and 442.

The appellant was charged before the learned President of the Sessions Court, Johore Bahru on two charges namely (a) for failing to declare under section 99 of the Customs Ordinance, 1952 dutiable goods and thereby committing an offence under section 129(1)(e) and punishable under section 129(1) of the Ordinance, and (b) for denying to be in possession of dutiable goods and thereby committing an offence under section 131(1)(f) and punishable under section 131(1)(i) of the said Ordinance. He was convicted on both charges and the dutiable goods (gold) were confiscated. On appeal against conviction and sentence,

Held: (1) the appellant having made a false declaration, it was not incumbent upon the customs authorities to give him an opportunity to correct it by waiting until he attempted to leave the customs area before proving that it was false;

(2) when the appellant replied that he had nothing, when in fact he was carrying gold which was dutiable and which he well knew was dutiable, he had denied that he had any dutiable goods in his possession;

(3) appeal against conviction should be dismissed, but appeal against sentence should be allowed to the extent that the appellant's character and clean record had to be taken into consideration.

Observations on the admissibility of evidence of similar facts.

Cases referred to:—

(1) *X.* v. *Public Prosecutor* [1951] M.L.J. 10; 2 M.L.R. 12.

(2) *Rauf bin Haji Ahmad* v. *Public Prosecutor* [1950] M.L.J. 190; 1 M.L.R. 108.

(3) *R. V. Raju & Ors.* v. *R.* [1953] M.L.J. 21.

(4) *Maxwell* v. *Director of Public Prosecution* 24 Cr. App. R. 152 at p. 176.

(5) *Noor Mohamed* v. *R.* [1949] 1 All E.R. 365.

CRIMINAL APPEAL.

L. Rayner for the appellant.

Pawan Ahmad (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Adams J.: The appellant in this case was charged before the learned President of the Sessions Court, Johore Bahru, as follows :—

1st Charge.

"That you, Kan Sik Fong, at about 8.15 a.m. on 22-3-60, at the Customs Inward Gate, Causeway, Johore Bahru, being required by section 99 of the Customs Ordinance, 1952, to make a declaration of dutiable goods, to wit 14 bars of gold weighing 150 tahils, imported by you, did fail to make such declaration, thereby committing an offence under section 129(1)(e) and punishable under section 129(1) of the Customs Ordinance, 1952."

2nd Charge.

"That you, Kan Sik Fong, at about 8.15 a.m. on 22-3-60, at the Customs Inward Gate, Causeway, Johore Bahru, being a passenger by bus from Singapore to Johore Bahru, were found to have in your possession dutiable goods, to wit 14 bars of gold weighing 150 tahils, valued at $18,750 after you had denied that you had any dutiable goods in your possession, thereby committing an offence under section 131(1)(f) and punishable under section 131(1)(i) of the Customs Ordinance, 1952."

He was convicted on both charges, and on the first charge he was sentenced to pay a fine of $5,000 or in default two years imprisonment, and on the second charge to pay a fine of $30,000 or in default three years imprisonment. The gold, the subject of the charges, was confiscated.

The brief facts on which the charges were based were as follows. The appellant, who is 49 years of age, was employed as a gold bar salesman by Messrs. Yee Shing Co., Ltd., Kuala Lumpur, who are licensed dealers in gold and who refine gold bought from the Raub Gold Mine. He was an old employee of the Company, having been in charge of their branch at Mersing at a salary of $400 per month. He was however only paid $230 per month in Kuala Lumpur. The Mersing branch did not deal in gold. On the 22nd March, 1960, the appellant was a passenger on an omnibus which arrived from Singapore at the customs station at Johore Bahru. There he was found to be in possession of 14 bars of gold weighing 150 tahils which was concealed in a special belt round his waist. This gold bore the markings which the learned President was satisfied were made by dyes which the appellant and his witnesses deposed were kept under lock and key in the possession of the Kuala Lumpur branch and which were different from the dyes used to mark gold ingots produced in Singapore.

Revenue officer 1194 (PW1) deposed that he boarded the omnibus at the customs station and asked the appellant in common with other passengers if he had anything with him, to which the appellant replied that he had nothing, and Revenue Officer (P) 907 (PW2) corroborated that statement. Revenue Officer (P) 907 (PW2) deposed further that he asked the appellant if the appellant had any gold or watches or any other articles of that sort. The appellant replied that he had not. The appellant was then taken to the office and searched, when the gold was found on him. On those facts the appellant was convicted.

Mr. Rayner who appeared for the appellant, argued the appeal with great thoroughness. He submitted five grounds of appeal against conviction and also appealed against the sentence. It will be as well if I deal with the second ground of appeal first which was that the prosecuting officer was not qualified to prosecute under the provisions of section 113 of the Customs Ordinance. This ground was abandoned on the production of the Government *Gazette* Notification No. 906 dated 12th December, 1957, which clearly shows that Mr. Lee Sai Chong was competent to prosecute.

The first ground was that there was no, or insufficient evidence led by the prosecution to support a conviction on either of the charges, and the fifth ground was that the conviction was against the weight of the evidence. Although Mr. Rayner dealt with them separately, it will be more convenient, I think, if I deal with them together. Mr. Rayner argued that there was no evidence as to whether or not the customs station was the terminus of the journey of the omnibus, and that therefore the appellant was entitled to be given an opportunity to make a correct declaration until he reached the boundary of the customs area. There was no evidence that this was done. But, if one accepts the evidence of the two revenue officers, the appellant was asked if he had anything and he replied that he had not. Whereas it is true that if no declaration had been made or requested, the person required to make a declaration should be given every opportunity to do so right up to the last possible moment, in this case the appellant made a declaration as a result of the usual questions put to him by a proper officer of customs, and having made a declaration which was false I do not consider it incumbent upon the customs authorities to give him an opportunity to correct it by waiting until he attempted to leave the customs area before proving that it was false.

Mr. Rayner then argued that on the evidence the appellant in fact was misled by the form of the words used. He conceded that under section 99 of the Customs Ordinance there is an absolute duty on any person arriving in the Federation to declare all dutiable goods, but argued that on the evidence of the two revenue officers the appellant was never given an opportunity to do so. Revenue officer 1194 (PW1) said that he asked the appellant "if he had anything with him". I presume the words used were similar to those used by revenue officer (P) 907 (PW2) in Malay "Ada apa[2] barang". Mr. Rayner argued that this would mislead and that the appellant should have been asked "Have you anything dutiable to declare" and shown a list of the usual dutiable articles. With great respect to Mr. Rayner I think that the reactions of any reasonable man on arriving at

a customs station and on being asked "Ada apa[2] barang" by a revenue officer in uniform would be to understand that he was being invited to make his declaration as required by section 99 of the Customs Ordinance, and I am quite certain that the appellant so understood it. It follows therefore that when the appellant replied that he had nothing, when in fact he was carrying gold which was dutiable and which he well knew was dutiable, he had denied that he had any dutiable goods in his possession. Mr. Rayner further argued that the cross-examination of PW2 (revenue officer (P) 907) contradicted his evidence-in-chief. In his evidence-in-chief he said that he asked the appellant if he had any gold or watches or any other articles of that sort. The evidence in cross-examination reads as follows: — "Yes I spoke in Malay, 'Ada apa[2] barang'. His answer was not 'Ada' but 'Tidah, ada apa[2]' ". At this point in the record where this appears it is clear that counsel was putting the defence to this witness, and I do not consider that in the context the answer given in fact meant that he did not ask the appellant if he had any gold, or watches or any other articles of that sort.

The appellant's evidence on this point was that he had the gold on his person as stated by the customs officers. He said that a customs officer in uniform came into the omnibus and had a look round and left. Then another person in mufti boarded the omnibus and came up to the appellant, pressed his pockets and waist, and when he pressed his waist this person said "Apa ini" to which the appellant says that he replied "Emas". The appellant was then taken to the office where he produced the gold. Mr. Rayner complained that the learned President has not considered the defence. He pointed out that it would be pointless to smuggle gold into the Federation because the price of gold was higher in Singapore than in the Federation and therefore the probabilities are that the appellant did declare the gold and his story is therefore at least consistent with the truth. The appellant therefore should have been given the benefit of the doubt (see *Murtagh & Kennedy*[1]). It is true that the learned President has not specifically dealt with this piece of the defence in his long and very careful grounds of decisions, but he clearly has carefully considered the whole of the defence since he has accepted the history of the origin of the gold as deposed to by the defence, namely that it was refined in Raub and was taken out of the Federation the day previously by the appellant. In view of this, I think it may be clearly presumed that the learned President considered this point also. It is very difficult to believe that a person who had spent many years in Mersing as the Manager of the branch of his present employers there could misunderstand the simple Malay put to him by the customs officers, and it is difficult to believe that the customs officer in uniform should get on the omnibus and then get off again without saying anything. Furthermore I do not believe that the two customs officers concerned would commit deliberate perjury.

I think the learned President was right in accepting the evidence of these two witnesses and, if their evidence is accepted, then it is quite clear that the appellant failed to make a declaration as required by section 99 of the Customs Ordinance, and that in addition to this he had dutiable goods valued at $18,750 in his possession at the time he made a denial. The fact that the price of gold in the Federation was lower than that in Singapore is not conclusive one way or the other. The prosecution do not have to prove motive.

The third ground of appeal arose out of a statement made during the course of the evidence by revenue officer (P) 907 (PW2) who said that he asked the appellant to come out of the omnibus and that on the way to the office the appellant asked (PW2) to help him and not to take him to the office. PW2 further stated that the appellant said he would give $3,000 as coffee money. No protest to this piece of evidence was made at the trial and indeed he was cross-examined on the point. The learned President mentions it in his grounds of decision when he is setting out the facts deposed to by the prosecution, but does not mention it again. From his reasoning it is clear that he has not taken it into consideration when he was deciding on the guilt of the appellant. Mr. Rayner argued that this statement was inadmissible, was highly prejudicial, should on no account have been admitted, and must have prejudiced the mind of the learned President.

This piece of evidence, if it is admissible at all, would only be admissible under sections 11 and 14 of the Evidence Ordinance. It is not competent for the prosecution to adduce evidence which tends to show that the appellant has been guilty of a criminal act other than that covered in the charge for the purpose of showing that he is a person likely from his character to commit the offence charged). (See *X.* v. *Public Prosecutor*[1]). Thomson J. (as he then was) in *Rauf bin Haji Ahmad* v. *Public Prosecutor*[2] dealt with this difficult matter at length and reviewed the authorities. It was again considered by Spenser-Wilkinson J. in *R. V. Raju & Ors.* v. *R.*[3]. In that case the learned Judge said :—

> "Generally speaking the evidence of similar facts may be relevant for the following purposes, though this list may not be exhaustive:—
>
> 1. To negative accident;
> 2. To prove identity;
> 3. Where *mens rea* is the gist of the offence, to prove intention; and
> 4. To rebut a defence which would otherwise be open to the accused."

I do not think that the above unfortunate statement by PW2 falls under any of these heads. The evidence that a person offered a bribe is

inconclusive in any event. It does not necessarily mean that a person is guilty of another offence with which he may be threatened. *Mens rea* is not the gist of these offences with which the appellant was charged. Once the appellant failed to comply with the provisions of section 99 (no doubt because he hoped to defraud the revenue) he committed an offence, and if he made a false declaration (no doubt with the same hope) he committed the second of the offences with which he was charged. This statement should therefore never have been admitted. Statements of this nature must be avoided, and it can be done quite easily by the careful examination-in-chief of a witness. I do not think that it was deliberately put in to prejudice the Court. The witness was merely relating in chronological order what happened.

Although this piece of evidence appears in the evidence of PW2 (revenue officer (P) 907), PW3 (revenue officer (P) 512), and PW4 (senior customs officer (P)), no objection was taken to its admission on any occasion. Apparently it was thought to be admissible because of the fact that it formed part of the history of events leading up to the present charges. The learned President does not mention the matter in his reasons for finding the appellant guilty. Reading his judgment I am quite satisfied that the admission of this piece of evidence has weighed in no way with the President when he came to consider the evidence against the appellant and there is ample evidence without it on which to convict the appellant.

The learned Deputy Public Prosecutor argued that since its admission had no effect whatsoever on the mind of the learned President, the provisions of section 422 of the Criminal Procedure Code should apply, since there has been no failure of justice. Mr. Rayner referred me to the last paragraph of the Lord Chancellor's judgment in *Maxwell* v. *Director of Pubic Prosecutions*[4]. That case related to inadmissible evidence produced before a Jury. In this case there was no possibility of the learned President coming on the facts to any other decision than the one he has reached, and there has been therefore no failure of justice. There was also no Jury. The learned President is legally qualified and quite clearly put the matter out of his mind.

Statements of this nature should only be admitted after very careful consideration by both the prosecutor and the Court to ensure that they are admissible for one of the purposes outlined in *Raju's case, supra,* and even then the Court must consider whether it is in the interests of justice to admit the statements. The Court always has a discretion in this matter. As was said in the case of *Noor Mohamed* v. *R.* [5] :—

> "The Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the Judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the Judge."

This statement was inadmissible and, even if it were admissible, it should have been excluded by reason of the direction above quoted, and I think this is a case to which section 422 of the Criminal Procedure Code applies.

The fourth ground of appeal was that the learned President was wrong in reading the statement made by the appellant to a customs officer on the day of his arrest and that the learned President failed to comply with the provisions of section 155(c) of the Evidence Ordinance. It is very difficult from the record to find out exactly what happened. Apparently the prosecuting officer asked to use the statement made by the appellant under the provisions of section 155(c) of the Evidence Ordinance to show that he had in fact made a statement which was inconsistent with his present evidence. This of course was unnecessary. The record then goes on to say that the learned President then read that part of the statement which the prosecutor alleged was inconsistent with the appellant's present evidence, found that there was a material contradiction and permitted the prosecution to proceed. That part of the statement was then read and explained to the appellant, and that apparently is all that happened, because at the end of the case for the defence the prosecution applied for the appellant to be recalled so that he might be cross-examined on the statement that he had made to the customs officer. This was not permitted by the learned President, nor was the statement ever proved, nor is it in fact referred to in the grounds of decision of the learned President.

Mr. Rayner argued that the learned President had clearly been confused between a statement made to a police officer which it is sought to use under the provisions of section 113(2) of the Criminal Procedure Code, with the procedure to be adopted under section 155 of the Evidence Ordinance. What the prosecution should, of course, have done was to have first of all asked the appellant if he admitted making a statement and then cross-examined him on the statement made. Then under the provisions of section 145 of the Evidence Ordinance to call his attention to those parts of the written statement which are to be used for contradicting him, and at a later stage to prove the statement properly by calling the person who took it. When that has been done, and not before, the learned President is entitled to look at the statement. But the fact that the learned President did look at the statement and has made no reference to it in his grounds of decision, having refused to

permit the prosecution at a later stage to recall the appellant for the purpose of cross-examining him on his previous statement, shows in my view that he clearly put the whole thing from his mind, and the error in procedure has in no way occasioned a miscarriage of justice. I am therefore of the opinion that the appellant was rightly convicted on the charges.

The only question that remains therefore is the question of sentence. The maximum punishment for an offence under section 129(1)(e) of the Customs Ordinance is a term of imprisonment for two years or to a fine of $5,000, or both. The learned President has in fact therefore fined the appellant the maximum on this charge. The punishment for an offence under section 131(1)(f) of the Customs Ordinance is a fine of not less than six times the amount of the duty or $5,000 whichever is the lesser amount, and not more than 20 times the amount of the duty or $5,000 whichever is the greater. The appellant was a first offender and hitherto of good character. The value of the 14 bars of gold was $18,750, and since the duty on gold is 25% of its value the duty payable was $4,687.50.

Mr. Rayner argued that the two offences were really one. The offence under section 131(1)(f) requires a denial at the customs station of the possession of dutiable goods, and to impose the maximum fine possible on that charge and an extremely heavy one on the second charge on a first offender was contrary to justice. The appellant is an employee earning $230 per month and could never pay the fines. He would therefore have to serve five years' imprisonment.

It is very necessary that the convicting Court shows what it took into consideration when it arrived at its sentence. The appellant put his character in issue, he is a first offender, and there is evidence to show that he has played an active part in local affairs, having been Chairman of the Chamber of Commerce at Mersing, Treasurer of the District Welfare Committee, and a Town Councillor, etc., etc. The learned President clearly rejected the appellant's explanation that, having come to Johore Bahru to catch a train to Kuala Lumpur, he felt ill and took the gold to Singapore, since the appellant was found in an omnibus the next morning and not in the day mail to Kuala Lumpur. But he should at least have considered the previous good character of the appellant. The learned President unfortunately has given no reasons to show how he arrived at his penalties. No doubt he took into consideration the fact that gold is a vital part of the country's economy and to export it or to import it without complying with the provisions and rules concerning its export or import is an extremely serious offence since it touches the very foundations of the currency.

I think there is substance in Mr. Rayner's submission on this point, and I consider that a nominal fine of $500 or three months imprisonment will be sufficient on the first charge.

On the second charge, since the appellant is a first offender, I consider that he should be fined the minimum, that is six times the duty payable of $4,687.50 which amounts to $28,125.00 or in default 18 months.

The gold is automatically forfeited under the provisions of section 123 of the Customs Ordinance.

The appeal against conviction is dismissed but the appeal against sentence is allowed to the extent that I have indicated above.

Order accordingly.

MAMAT & ORS. v. MAHMOOD

[A.C.J. (Hepworth J.) January 22, 1961]

[Kota Bharu — Civil Appeal No. 34 of 1959]

Land Laws — Kelantan Land Settlement Ordinance, 1955, ss.5, 7, 8 and 16 — Application to State land — Findings of District Officer — Whether ultra vires — "Possession" in s.7 — Meaning of — Reference to Objects and Reasons in Bill — Kelantan Land Enactment, 1938, ss.2, 13 and 14.

At an enquiry held under section 5 of the Kelantan Land Settlement Ordinance, 1955, the Assistant District Officer, after hearing the appellants and the respondent made an order that the land in question, which was held by the respondent under an Approved Application, but was in the physical occupation of the appellants, be registered in the names of the appellants as co-proprietors. From this decision, the respondent appealed to the District Officer under the provisions of section 16 of the Ordinance. At the hearing, the District Officer allowed the appeal and, *inter alia*, awarded the land in question to the respondent. From this order, the appellants appealed to the High Court under the provisions of section 16 of the Ordinance. One of the grounds of appeal was that the findings of the District Officer were *ultra vires*.

Held: (1) the Kelantan Land Settlement Ordinance has no application to State land except where specific provision is made, as in section 7;

(2) the word "possession" in sections 7 and 8 of the Ordinance means actual possession;

(3) section 7 is inapplicable in this case because the persons in actual occupation of the land are the appellants who do not come within the ambit of the section;

(4) as the land is not registered in the name of anyone as proprietor, sub-section (1) of section 8 is also inapplicable;

(5) the Assistant District Officer and District Officer acted *ultra vires* with regard to the land in question because the Ordinance is not applicable to the particular facts of this case.

Cases referred to:—

(1) *Ren* v. *Bulkeley* 1 Doug 292.

(2) *R.* v. *St. Nicholas, Rochester* 3 L.J.M.C. 45.

(3) *Murray* v. *Thorniley* 2 C.B. 217.

CIVIL APPEAL.

H. L. Wrigglesworth for the appellants.

Respondent in person.

Cur. Adv. Vult.

Hepworth J.: This is an appeal under section 16 of the Kelantan Land Settlement Ordinance, 1955, from an Order of the District Officer, Pasir Mas, made on the 13th July, 1959,